Case Law Update – 2019-2020[1]

Prepared by John D. Hadden
The Hadden Law Firm, LLC

Evidence/Witnesses

Lee v. Smith,--- Ga. ---, --- S.E.2d ---, 2020 WL 609660, Supreme Court Case No. S18G1549 (2020)

A trial judge excluded an expert witness at trial after the defendant attempted to call the witness to rebut the plaintiff's expert. On writ of certiorari, the Supreme Court posed the following questions:

> (1) May a trial court exclude an expert witness solely because the witness was identified after the deadline set in a scheduling, discovery, and/or case management order? and (2) If not, what factors should a trial court consider when exercising its discretion whether to exclude an expert witness who was identified after the deadline set in a scheduling, discovery, and/or case management order?

Answering these questions, the Court found that, first, an expert may not be excluded solely because that expert was not identified until after a scheduling, discovery, and/or case management order, finding that control over the case required some exercise of discretion to establish the proper remedy. To harsh a remedy, moreover, can constitute an abuse of discretion.

Turning to the second question – the factors to be considered in whether to exclude a witness – the Court looked to federal Circuit Courts, and others. It ultimately held that, in general, the following factors should be considered:

> (1) the explanation for the failure to disclose the witness, (2) the importance of the testimony, (3) the prejudice to the opposing party if the witness is allowed to testify, and (4) whether a less harsh remedy than the exclusion of the witness would be sufficient to ameliorate the prejudice and vindicate the trial court's authority.

The trial court's ruling was therefore vacated for further consideration of the witness's exclusion.

[1] And one from 2018.

Bad Faith

First Acceptance Ins. Co. of Ga. v. Hughes, 305 Ga. 489, 826 S.E.2d 71 (2019)

In this case, the Supreme Court considered "whether an insurer's duty to settle arises when it knows or reasonably should know settlement with an injured party within the insured's policy limits is possible or only when the injured party presents a valid offer to settle within the insured's policy limits." On that question, it held that "To the extent that this Court's decisions have been deemed to be unclear, we take this opportunity to clarify that an insurer's duty to settle arises when the injured party presents a valid offer to settle within the insured's policy limits."

Julie An and Jina Hong (the underlying plaintiffs) sustained serious injuries in an auto collision with a First Acceptance insured, along with two other individuals. Based on the Court's finding that bad faith required the existence of a valid policy-limit demand, the Court then held that, construing the underlying plaintiffs' attorney's correspondence with First Assurance against the drafter, his letters did not constitute an unequivocal policy-limit demand, and therefore the insurer's duty to settle was not triggered.

Statute of limitations and Contract

Langley v. MP Spring Lake, --- Ga. ---, 834 S.E.2d 800 (2019)

In a premises liability fall case brought by an tenant of an apartment complex, the owner of the complex moved for summary judgment because the lease agreement contained a clause requiring all suits to be brought within one year, as opposed to the standard two-year statute of limitation. The trial court granted summary judgment, and the Court of Appeals affirmed. On writ of certiorari to the Supreme Court, the Court reversed, finding that, construing the contract against the drafter (the owner), the parties did not intend to apply this contractual term to a separate tort claim.

A word of caution however: the Supreme Court noted that

> We express no opinion as to whether a lease agreement ever could be worded and structured so as to provide limitations on the period in which the tenant could bring tort claims against the landlord, and we likewise express no opinion about the extent to which such limitations would be enforceable.

Therefore, that question will remain open until challenged in a later case, and it is likely that some apartment operators have, or at least will, attempt to modify their lease agreements to allow enforcement of such a limitation outside of a contract claim.

Batson challenges/Voir dire

AIKG, LLC v. Marshall, 350 Ga. App. 413, 829 S.E.2d 608 (2019)
Lowndes County Health Services, LLC v. Copeland, 352 Ga. App. 233, 834 S.E.2d 322 (2019)

This pair of cases serves as a good illustration of the application of the principles of *Batson* and its progeny, as well as the confusion that sometimes arises when *Batson* challenges arise.

Marshall involved an injury at an Andretti go-cart facility. At trial, defense counsel used all of its strikes to remove African Americans from the jury. Plaintiff's counsel made a Batson challenge, and after much back and forth, the trial court ultimately granted all but one of the challenges. On appeal, the defendant claimed that the trial court had incorrectly applied the three steps of a proper *Batson* analysis (discussed below), and therefore the challenges had been improperly granted. Specifically, the defense argued that the trial court had combined steps two and three and therefore the analysis was flawed.

In *Copeland*, the plaintiff struck a white juror, and the defense made a *Batson* challenge alleging that the challenge was racially discriminatory because neither side had much information on that juror and therefore a presumption arose that the strike must have been racially motivated. During a later discussion on the record, plaintiff's counsel made a comment that due to the juror's demographics and job description, there was concern that he would not be favorable to the African-American plaintiff, but this comment was not raised by the defense until seeking a new trial. The trial court denied the *Batson* challenge and allowed the juror to remain off the jury, and the defendant appealed.

In both cases, the Court of Appeals upheld the rulings of the trial court. It noted the broad discretion of the trial judge in such matters, particularly because Batson challenges involve the subjective intent of the parties and counsel, and rthe fact that the trial judge is best situated to observe the demeanor of the parties. Moreover, even where the three steps are not perfectly delineated, and strictly followed, that discretion will be upheld.

Nevertheless, it is important for parties to ensure that they and the court properly conducts the analysis in order to avoid reversal. The Court repeated the three steps of a challenge in *Marshall* (internal formatting and citations omitted):

> Establishing a *Batson* violation requires satisfaction of a three-prong test: (1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the strike must then provide a race-neutral explanation for the strike; and (3) the court must decide whether the opponent of the strike has proven discriminatory intent.

Ante litem notice

Moats v. Mendez, 349 Ga. App. 811, 824 S.E.2d 808 (2019)

Mendez was injured in a collision with a Polk County Sheriff's Deputy. Prior to filing suit against the sheriff, in his official capacity, Mendez sent an otherwise proper ante litem notice to Polk County. Suit was then filed against the sheriff, who moved to dismiss based on failure to send a proper ante litem notice to the sheriff. The trial court denied the motion, but granted a certificate of immediate review, and the Court of Appeals agreed to hear the case. The Court ultimately agreed with the sheriff that ante litem notice was required to be sent to the sheriff, not the county, and reversed. The decision is notable because nowhere in the county ante-litem notice statute is service upon a sheriff contemplated, and the Supreme Court has granted a writ of certiorari in the case.

O.C.G.A. § 9-11-15 relation back

Cannon v. Oconee County, --- Ga. App. ---, 835 S.E.2d 753 (2019)

The parents of a young woman killed while a passenger in a vehicle being pursued by an Oconee County Sheriff's Deputy brought suit against the county for her wrongful death. After litigating the case extensively with the assistance of the Sheriff's department, and after the statute of litigation had expired, the County moved for summary judgment arguing that the sheriff, in his official capacity, was the proper party. The plaintiffs responded, arguing that the County could be a proper party, and also moved to substitute the sheriff for the county. The trial court granted the county's motion and denied the plaintiffs motion to substitute.

On appeal, the Court of Appeals agreed that the sheriff was the proper party, but reversed the trial court regarding the plaintiffs' attempt to substitute as an abuse of discretion, citing U.S. Supreme Court authority. The sheriff and county knew that the sheriff was the proper party all along, the Court found, and therefore the case should be allowed to proceed against the sheriff.

Tenet Healthsystem GB, Inc. v. Thomas, 304 Ga. 86, 816 S.E.2d 627 (2018)

The plaintiff filed suit and served defendant hospital prior to the expiration of the statute of limitation, alleging negligence of doctors. More than one year later, after expiration of the statute, the plaintiff filed amended the complaint alleging new theory of negligence based on the acts of nursing staff under a under theory of respondeat superior. After the trial court dismissed the new claims, the Court of Appeals, and then the Supreme Court, ruled that the new claims related back because they arose from the same "conduct, transaction, or occurrence."